STATE OF MICHIGAN

COURT OF APPEALS

BRIAN RUSSELL and CAROL RUSSELL,

Plaintiffs/Counterdefendants-Appellees,

v

WILLIAM E. LEAR II, ROBERTA LEAR, MICHAEL NICKEL, and CYNTHIA HORVATH,

Defendants/Counterplaintiffs-Appellants,

and

THOMAS R. TEITSMA and ROXANNE L. TEITSMA,

Defendants.

UNPUBLISHED
June 27, 2000

No. 214759
Ionia Circuit Court
LC No. 97-018316-CH

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

Defendants Lear, Nickel, and Horvath appeal as of right from the judgment entered by the trial court following a bench trial regarding a property dispute. We affirm in part, on other grounds, reverse in part, and remand for further proceedings.

On appeal, defendants argue that the trial court erroneously denied their motion for summary disposition with regard to plaintiffs' claims of adverse possession, acquiescence and prescriptive easement. The motion having been denied, the case proceeded through a bench trial and defendants now also claim that the trial court erred in denying their motion for an involuntary dismissal and by finding that plaintiffs had satisfied their burden of proof at trial. Defendants further argue that the trial

court erred in finding that plaintiffs did not violate the deed restrictions with regard to plaintiffs' property, which are issues that defendants had raised in a counterclaim.

Initially, we address defendants' arguments regarding the trial court's failure to grant summary disposition in favor of defendants. Defendants argue that the trial court erred in failing to grant their motion for summary disposition of plaintiffs' adverse possession claim concerning the grass strip of land at issue and plaintiffs' prescriptive easement claim concerning the paved roadway known as Lear Court because plaintiffs could not establish the necessary privity to allow for tacking in order to satisfy the requirements of fifteen years of use under both theories. We agree.

We review a trial court's grant or denial of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). When reviewing a motion brought under MCR 2.116(C)(10), the Court must review the trial court record to determine if the movant was entitled to judgment as a matter of law. *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995). The court must consider evidence submitted or filed in the action, including affidavits, pleadings, depositions, admissions, and documents. *Id.* All reasonable inferences are to be drawn in favor of the nonmoving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995).

To establish adverse possession, a party must show that his or her possession is actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period of fifteen years. MCL 600.5801(4); MSA 27A.5801(4); *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). With regard to the required element of continuous possession, a party claiming adverse possession of land may "tack" on the possessory periods of his predecessors in interest to achieve this fifteen-year period by showing privity of estate. *Dubois v Karazin*, 315 Mich 598, 605-606; 24 NW2d 414 (1946); *Connelly v Buckingham*, 136 Mich App 462, 474; 357 NW2d 70 (1984). This privity may be shown by including a description of the disputed acreage in the deed or by an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance. *Dubois, supra*; *Siegel v Renkiewicz Estate*, 373 Mich 421, 425; 129 NW2d 876 (1964); *Connelly, supra*. Plaintiffs concede that their only method of achieving the required fifteen years is to tack on the possession of their predecessors by parol transfer.

After reviewing the record, we conclude that plaintiffs failed to demonstrate any question of fact regarding privity so that plaintiffs could tack on the prior possession of the land by their predecessors. Both plaintiffs conceded that neither the strip of grass nor an easement to use the private roadway known as Lear Court were included in their deed, nor were they mentioned at the time of conveyance. Plaintiffs' predecessor in interest, George Batty, stated that he could not recall any discussions with plaintiffs before the sale regarding the dimensions of the property. Plaintiffs' proofs failed to demonstrate a question of fact regarding the existence of the parol transfer. While plaintiffs claim that the Battys clearly intended to transfer ownership of the strip to them, this sort of unstated intent is insufficient to constitute a parol transfer. See *Seigel, supra*.

Like their adverse possession claim, plaintiffs' claim of prescriptive easement[1] should also have been dismissed. Similar to adverse possession, a prescriptive easement requires fifteen years of use. *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 645; 528 NW2d 221 (1995). Again, plaintiffs can only demonstrate these years of use if allowed to tack on the prior periods of possession of past owners. Privity is required to tack on the prior possessory periods of prior owners for the purposes of a prescriptive easement. *Siegel, supra*; *von Meding v Strahl*, 319 Mich 598, 614-615; 30 NW2d 363 (1948). In light of the earlier discussion of plaintiffs' failure to establish a question of fact regarding privity, the trial court should have granted summary disposition of this claim.

However, the trial court did not err in failing to summarily dispose of plaintiffs' acquiescence claim because a question of fact existed. Under the doctrine of acquiescence, a boundary line to which adjoining property owners acquiesce for more than fifteen years becomes the actual boundary line. *West Michigan Dock, supra* at 511-512. The underlying reason for the rule of acquiescence is the promotion of peaceful resolution of boundary disputes. *Shields v Collins*, 83 Mich App 268, 271; 268 NW2d 371 (1978).

Here, while defendants argued that they had never agreed to treat the pavement edge of Lear Court as the boundary, plaintiffs presented their affidavits and deposition testimony from previous owners of plaintiffs' property that established that the land in question was maintained and used by the various property owners from 1974 until 1992, treating the pavement as the boundary. Defendants presented affidavits of the Lears, who stated that they regularly used the strip themselves, demonstrating that they never treated the pavement edge as the boundary line. These conflicting affidavits and testimony created an issue of fact regarding plaintiffs' acquiescence claim, thereby barring summary disposition.

Defendants' remaining arguments deal with the trial court's determinations during and at the conclusion of a bench trial. Defendants argue that the trial court erred by denying their motion for an involuntary dismissal and by finding that plaintiffs had satisfied their burden of proof at trial. The trial court's grant or denial of a motion for involuntary dismissal will not be reversed unless clearly erroneous. *Stanton v Dachille*, 186 Mich App 247, 261; 463 NW2d 479 (1990). A finding is clearly erroneous when, although evidence supports it, this Court is left with a firm conviction that a mistake has been made. *Featherston v Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6 (1997). Actions to quiet title are equitable in nature and therefore reviewed de novo. *Dobie v Morrison*, 227 Mich App 536, 538; 575 NW2d 817 (1998).

While the trial court erred in finding that plaintiffs had established adverse possession of the grass strip and a prescriptive easement to Lear Court, we affirm the trial court's ruling because plaintiffs

[1] "An easement is a right to use the land of another for a specific purpose." *Bowen v Buck & Fur Hunting Club*, 217 Mich App 191, 192; 550 NW2d 850 (1996). "[A]n easement by prescription arises from a use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years." *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 645; 528 NW2d 221 (1995).

established that the pavement edge served as the boundary of the property for the requisite fifteen years under the theory of acquiescence. "Where the trial court reaches a correct result for the wrong reason, the result will not be disturbed on appeal." *Paul v Bogle*, 193 Mich App 479, 492; 484 NW2d 728 (1992); *Reisman v Regents of Wayne State University*, 188 Mich App 526, 530; 470 NW2d 678 (1991).

One of the bases for an acquiescence claim is acquiescence for the statutory period, see *Pyne v Elliott*, 53 Mich App 419, 426; 220 NW2d 54 (1974), which occurs when the property owners have treated a line as the legal and correct boundary between two parcels for the required fifteen years, *Walters v Snyder*, 225 Mich App 219, 224; 570 NW2d 301 (1997). This method requires a showing that the parties acquiesced to the line and treated the line as the boundary for the statutory period, irrespective of whether there was a bona fide controversy regarding the boundary. *Walters, supra*. Unlike a claim based on adverse possession, an assertion of acquiescence does not require that the possession be hostile or without permission. *Id.* Additionally, the acquiescence of predecessors in title can be tacked onto that of the parties in order to establish the statutorily mandated period of fifteen years, *Geneja v Ritter*, 132 Mich App 206, 211; 347 NW2d 207 (1984), quoting *Renwick v Noggle*, 247 Mich 150, 152; 225 NW 535 (1929), and proof of privity is unnecessary, *Siegel*, *supra* at 426.

Here, plaintiffs and their predecessors in interest testified at trial that they maintained and used the strip for landscaping, recreation, parking, and entering their driveway and garage. These witnesses denied that defendants and their predecessors had taken any action on the strip since 1974 other than occasionally plowing slightly off the road to ensure a clear roadway. The pavement edge was a definite line, discernible for all to see. Although the trial court erred in finding adverse possession, in the context of that ruling the trial court clearly resolved the factual disputes as to whether the parties acquiesced to this boundary. Implicit in the trial court's holding was that the land from plaintiffs' property to the pavement was treated by the parties as the boundary for the statutory period. Under these circumstances, we conclude that plaintiffs established acquiescence, and thus we affirm the trial court's ruling with regard to the grass strip, albeit on the ground of acquiescence.[2]

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[2] George Batty's uncertainty regarding his ownership of the strip does not affect plaintiffs' acquiescence claim. While plaintiffs' immediate grantor did not believe that he owned the grass strip, he did believe that he had the right to use the strip and keep people off it, and he did in fact control the area when he lived on Lear Court. He intended to control the property to the edge of the pavement and treated the strip as part of his front yard. While adverse possession requires a certain level of hostility – in the legal sense – the doctrine of acquiescence for the statutory period is based on the idea that long respected boundaries should not be disturbed. Even an innocent mistake about the whereabouts of the true line may serve as the basis for an acquiescence claim. *Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993). Therefore, Batty's uncertainty does not render the acquiescence claim untenable, because he treated the pavement as the boundary line.

However, we find that the trial court erred in finding that plaintiffs had a prescriptive easement to the paved roadway. As discussed above with regard to defendants' motion for summary disposition, there being no proof of privity, plaintiffs could not establish a necessary element of prescriptive easement, i.e., fifteen years of continuous use. Accordingly, we reverse the trial court's finding of a prescriptive easement with regard to the paved roadway.

Finally, defendants argued that the trial court erred in ruling that plaintiffs did not violate deed restrictions by operating a day care facility on the property and building a pole building in 1995. The deed at issue contained a number of restrictions, including a proviso that the lots be used for residential purposes and a limitation on the number of buildings on a lot. Public policy favors building and use restrictions in residential deeds. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997); *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 157; 336 NW2d 778 (1983). However, restrictive covenants are strictly construed against grantors and the parties seeking to enforce the covenants with all doubts being resolved in favor of the free use of property. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 341-342; 591 NW2d 216 (1999), quoting *Wood v Blancke*, 304 Mich 283, 287; 8 NW2d 67 (1943).

Michigan Courts have consistently ruled that day care operations do not violate restrictions limiting property to residential use. *Terrien v Zwit*, 238 Mich App 412, 415; 605 NW2d 681 (1999); *Beverly Island Ass'n v Zinger*, 113 Mich App 322, 327-328, 331; 317 NW2d 611 (1982). The focus in such cases was on the activity involved and how it parallels the ordinary and common meaning of residential use of a lot. *Beverly Island*, *supra* at 327. In both *Terrien* and *Beverly Island*, this Court ruled that the defendants' care of children during the day constituted residential use and did not violate the covenants because the children were cared for in the same manner as the defendants' own children, making it similar to a very large family. *Terrien*, *supra* at 415-416; *Beverly Island*, *supra* at 331. Public policy favors the operation of family day care homes. *Id*.

Under *Terrien* and *Beverly Island*, Carol Russell's use of her home for her licensed day care operation[3] involving care for generally four children, not including her own three children, does not violate the restrictive covenant. The fact that Carol Russell earns income for her service is not dispositive, because the use of the property is identical to that of a large family. See *Terrien, supra* at 417-421. The trial court did not err in ruling that plaintiffs' day care operation did not violate the restrictive covenants.[4]

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[3] Apparently, Carol Russell was not licensed to take care of children until after this dispute arose. However, at trial her license was submitted as an exhibit.

[4] To the extent that defendants argue that the road is private, as opposed to public, and this status renders *Beverly Island* inapplicable, we disagree. While the drop off and pick up of the children may be more noticeable on a private road, it would not be more obtrusive than on a public road. See *Beverly Island*, *supra* at 331.

However, the trial court erred in concluding that laches barred defendants' claim that plaintiffs' pole building violated a deed restriction.[5] Laches is an affirmative defense that is waived if not raised in the party's responsive pleading. MCR 2.111(F)(2), (3); *Rowry v University of Michigan*, 441 Mich 1, 12; 490 NW2d 305 (1992); *Badon v General Motors Corp*, 188 Mich App 430, 436-437; 470 NW2d 436 (1991). Because plaintiffs failed to file any affirmative defenses to defendants' countercomplaint, nor did they later seek to file such a pleading, that defense was waived. Having erroneously concluded that laches applied, the trial court made no findings of fact regarding the pole barn in relation to the deed restrictions. Thus, this portion of the judgment must be reversed and remanded to the trial court for determination of whether the pole building violates the restrictive covenant in the deed.

Affirmed in part, reversed in part, and remanded for further action consistent with this opinion. We do not retain jurisdiction

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jeffrey G. Collins

[5] Laches depends not only on a lapse of time, but primarily on intervening circumstances that render inequitable any grant of relief to the dilatory party. *Rofe*, *supra* at 154, citing *In Re Crawford Estate*, 115 Mich App 19, 25-26; 320 NW2d 276 (1982). The defense is concerned with the inequity of permitting a claim to be enforced when the party seeking enforcement has not been diligent. *Rofe*, *supra*.